

E-FILED on 7/19/2011IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION12 In re Apple and AT&T iPad Unlimited Data  
13 Plan Litigation

14 ALL CONSOLIDATED ACTIONS

15 No. C-10-02553 RMW  
16 ORDER GRANTING AT&T MOBILITY'S  
17 MOTION TO COMPEL ARBITRATION  
18 AND STAY CLAIMS EXCEPT AS TO  
19 PLAINTIFF HANNA  
[Re Docket No. 93]20 Defendant AT&T Mobility LLC ("ATTM") moves to compel arbitration and stay  
21 proceedings against ATT M pending arbitration. On July 15, 2011, the court held a hearing to  
22 consider defendant's motion. Having considered the papers submitted by the parties and the  
23 arguments of counsel, and for the reasons set forth below, the court grants ATT M's motion to  
24 compel arbitration and stay claims except as to plaintiff Joe Hanna.

## I. BACKGROUND

25 Plaintiffs Adam Weisblatt ("Weisblatt"), Joe Hanna ("Hanna"), David Turk ("Turk"), Colette  
26 Osetek ("Osetek"), Stuart Logan ("Logan"), and Aaron Friedman ("Friedman") (collectively  
27 "plaintiffs") allege that defendants ATT M and Apple Inc. ("Apple") perpetrated a classic "bait and28 ORDER GRANTING AT&T MOBILITY'S MOTION TO COMPEL ARBITRATION AND STAY CLAIMS EXCEPT AS TO  
PLAINTIFF HANNA—No. C-10-02553 RMW

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1 switch" fraud scheme in connection with the sale of 3G capable iPads<sup>1</sup> for which ATTM was the  
2 exclusive 3G service provider. Master Consolidated Complaint ("MCC") ¶ 1. Plaintiffs allege that  
3 ATTM and Apple discontinued an unlimited data plan for iPads and that, although existing  
4 subscribers could keep the plan indefinitely, subscribers lost the ability to cancel and restart the plan  
5 whenever they wanted. MCC ¶¶ 42-44. The facts of this case are set forth in the court's order on  
6 ATTM's first motion to compel arbitration. *See* Dkt. No. 50. In that order, the court limited  
7 discovery to written discovery relevant to claims against Apple pending the Supreme Court's  
8 decision in *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893). In light of the  
9 Supreme's Court's recent ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011),  
10 ATTM again moves to compel arbitration of all claims against it.

11       **A. Arbitration Agreement**

12       During the alleged class period, customers who wished to activate 3G wireless data on the  
13 iPad were required to purchase a service plan from ATTM, the then exclusive 3G provider for the  
14 iPad. First, the customer followed several screens on the iPad and entered requested information at  
15 each step. Decl. of Kimberly D. Eubank, Dkt. No. 25 at ¶ 4. Before the customer could complete  
16 the activation process, the terms of ATTM's Session Based Wireless Data Services Agreement (the  
17 "iPad Agreement") were displayed for the customer in a scrollable text box with buttons labeled  
18 "Agree" and "Back" at the bottom. *Id.* To activate the wireless data service on the iPad, the  
19 customer was required to click the "Agree" button. *Id.* The iPad Agreement includes, among other  
20 things, an arbitration agreement:

21       **3.2 Arbitration Agreement**

22       (1) AT&T and you agree to arbitrate **all disputes and claims** between us. This  
agreement to arbitrate is intended to be broadly interpreted. It includes, but is not  
limited to:

- 23           • claims arising out of or relating to any aspect of the relationship  
24            between us, whether based in contract, tort, statute, fraud,  
25            misrepresentation or any other legal theory;  
          • claims that arose before this or any prior Agreement (including, but  
not limited to, claims relating to advertising);

26 \_\_\_\_\_  
27       <sup>1</sup> The iPad is a mobile computing and multimedia device with a touch screen interface manufactured  
by defendant Apple. It comes in a WiFi only model or a WiFi plus 3G data capable model.  
28

- 1           •       claims that are currently the subject of purported class action litigation  
 2           •       in which you are not a member of a certified class; and  
 3           •       claims that may arise after the termination of this Agreement

4     *Id.* Ex. 2 at 8. Moreover, the arbitration agreement expressly prohibits class actions: "**You agree**  
 5     **that, by entering into this Agreement, you and AT&T are each waiving the right to a trial by**  
 6     **jury or to participate in a class action.**" *Id.* The iPad Agreement also specifies that the "law of  
 7     the state of [the customer's] address shall govern this Agreement except to the extent that such law is  
 8     preempted by or inconsistent with applicable federal law." *Id.* Ex. 2 at 15.

9           **B.      Parties**

10          The plaintiffs are all ATTm customers: Logan, Hanna, and Friedman live in California,  
 11        Weisblatt lives in New York, Turk lives in Washington, and Osetek lives in Massachusetts. MCC ¶¶  
 12        11-14; Complaint, *Friedman v. Apple Inc.*, No. 11-01875 RMW, Dkt. No. 1, ¶ 27 ("Friedman  
 13        Compl."); Complaint, *Logan v. Apple Inc.*, No. 10-02588 RMW, Dkt. No. 1, ¶ 13 ("Logan Compl.").  
 14        Plaintiffs allege—and ATTm's records confirm—that Logan, Friedman, Weisblatt, and Osetek each  
 15        purchased and activated a 3G-compatible iPad on ATTm's network between April and November  
 16        2010. MCC ¶¶ 55, 57; *Friedman* Compl. ¶ 27; *Logan* Compl. ¶¶ 52-53. Turk bought three iPad  
 17        3Gs—two on April 30 and one on May 18, 2010. Dkt. No. 25 at ¶ 7, Exh. 4. Turk activated the iPad  
 18        3Gs on ATTm's network on April 30, May 4, and June 20, 2010, respectively. *Id.* Plaintiff Hanna  
 19        purchased an iPad 3G, but never activated 3G service. MCC ¶¶ 61-64. Although Hanna never  
 20        accepted the terms of ATTm's iPad Agreement, Hanna accepted the same arbitration agreement and  
 21        choice of law provision when he used ATTm's website to purchase an iPhone 3GS on June 11,  
 22        2009. Decl. of Caroline Mahone-Gonzalez, Dkt. No. 26 ¶ 4, Ex. 1.

23          Defendant ATTm now moves to compel arbitration and to stay all claims against it.

24           **II. ANALYSIS**

25           **A.      Choice of Law**

26          Plaintiffs contend that the enforceability of the arbitration agreements of Weisblatt, Turk,  
 27        and Osetek (residents of New York, Washington, and Massachusetts, respectively) should be  
 28        governed by California law. According to plaintiffs, their claims arise out of conduct emanating

1 from California. However, both parties agree that "it ultimately makes little difference what states'  
2 laws are applied." Dkt. No. 101 at 2; Dkt. No. 100 at 9.

3 To determine the enforceability of "contractual choice-of-law provisions, California courts  
4 shall apply the principles set forth in Restatement section 187, which reflects a strong policy  
5 favoring enforcement of such provisions." *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459,  
6 464-65, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 (1992). Restatement (Second) of Conflicts of Law §  
7 187(2) provides in part:

8 The law of the state chosen by the parties to govern their contractual rights and duties  
9 will be applied, even if the particular issue is one which the parties could not have  
10 resolved by an explicit provision in their agreement directed to that issue, unless  
either (a) the chosen state has no substantial relationship to the parties or the  
transaction and there is no other reasonable basis for the parties' choice, or (b)  
application of the law of the chosen state would be contrary to a fundamental policy  
of a state which has a materially greater interest than the chosen state in the  
determination of the particular issue and which, under the rule of § 188, would be the  
state of the applicable law in the absence of an effective choice of law by the parties.

13 The parties do not dispute that the first exception cannot be met. Dkt. No. 42 at 11.  
14 However, the parties dispute whether the second exception—whether application of another state's  
15 law in the present case would be contrary to a fundamental policy of the State of California—is met.  
16 If there is a fundamental conflict with California law, "the court must then determine whether  
17 California has a materially greater interest than the chosen state in the determination of the particular  
18 issue." *Nedlloyd*, 3 Cal. 4th at 466 (internal citation and quotation marks omitted). If so, the choice  
19 of law provision is not enforced. *Id.*; see also *Estate of Darulis*, 401 F.3d 1060, 1062 (9th Cir.  
20 2005); *Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 919-20 (Cal. 2001).

21 Here, California does not have a "materially greater" interest than New York, Massachusetts,  
22 or Washington in having its law applied to plaintiffs. Plaintiffs point to California's interest in  
23 protecting its citizens from fraud taking place in California. But Weisblatt, Turk, and Osetek are not  
24 California citizens, and their claims concern representations made by a Georgia based company  
25 (ATTM) in New York, Massachusetts, and Washington. Indeed, "California has no greater interest  
26 in protecting other state's consumers than other states have in protecting California's." *Discover*  
27 *Bank v. Superior Ct.*, 134 Cal. App. 4th 886, 895 (2005) (*Discover Bank II*). It is not enough that  
28 California is home to at least one plaintiff and defendant Apple, nor is it relevant that a number of

1 claims in this suit are brought pursuant to California law. Under the choice of law agreement and  
2 pursuant to Restatement principles, plaintiffs' claims should be governed by the law of their home  
3 states. In any event, both parties admit that it ultimately makes little difference which states' laws  
4 are applied.

5 **B. Arbitration Agreements of California Plaintiffs Friedman and Logan**

6 In *Concepcion*, the Supreme Court explained that "[r]equiring the availability of classwide  
7 arbitration interferes with fundamental attributes of arbitration and thus creates a scheme  
8 inconsistent with the FAA." 131 S. Ct. at 1748. The Supreme Court also held that the policy  
9 concerns underlying "California's *Discover Bank* rule" are beside the point, because "States cannot  
10 require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."  
11 *Id.* at 1753. However, plaintiffs argue that Cal. Civ. Code § 1668 still precludes enforcement of  
12 ATTM's arbitration agreement despite the Supreme Court's negative treatment of *Discover Bank v.*  
13 *Superior Court*, 113 P.3d 1100 (Cal. 2005).

14 Plaintiffs' argument that Cal. Civ. Code § 1668 continues to preclude enforcement of  
15 ATTM's class action waiver is unconvincing. Cal. Civ. Code § 1668 is the source of the *Discover*  
16 *Bank* rule that was explicitly rejected by the Supreme Court. See *Concepcion*, 131 S. Ct. at 1746  
17 (quoting *Discover Bank* (in turn quoting Cal. Civ. Code § 1668)). Plaintiffs' contention that their  
18 modest claims "simply do not provide sufficient motivation for an aggrieved customer to seek  
19 redress" on an individual basis (Opp. at 10) is the very argument that was struck down in  
20 *Concepcion*. Other courts have reached similar conclusions. See *Arellano v. T-Mobile USA, Inc.*,  
21 2011 WL 1842712, at \*2 (N.D. Cal. May 16, 2011) (noting that the Court in *Concepcion* rejected the  
22 argument that an arbitration agreement is void solely because small claims might be prohibitively  
23 expensive to pursue on an individual basis); *Zarandi v. Alliance Data Sys. Corp.*, 2011 WL  
24 1827228, at \*3 (C.D. Cal. May 9, 2011) (same); *Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL  
25 1691323, at \*3 (S.C. Cal. May 4, 2011) (same). Whether brought under *Discover Bank* or § 1668,  
26 the argument that ATTM's arbitration provision is unenforceable solely because it includes a class  
27 action waiver is no longer viable.

28

1 Plaintiffs fail to identify any terms of ATT's arbitration agreement that might preclude  
2 enforcement after *Concepcion*. As the Supreme Court recognized, the terms of ATT's arbitration  
3 provision are "sufficient to provide incentive for the individual prosecution of meritorious claims  
4 that are not immediately settled" and "essentially guarantee[]" that aggrieved customers are made  
5 whole. *Concepcion*, 131 S. Ct. at 1753 (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855-  
6 56 (9th Cir. 2009)). ATT's arbitration provision in no way limits plaintiffs' recover of attorneys'  
7 fees and costs if state law authorizes it. In addition, if the arbitrator awards them more than ATT's  
8 last settlement offer, plaintiffs are entitled to double attorney's fees. *Concepcion*, 131 S. Ct. at 1744.  
9 Plaintiffs argue that despite *Concepcion*, their claims for public injunctive relief under the CLRA or  
10 UCL are still exempt from arbitration. See *Broughton v. Cigna Healthplans of California*, 21 Cal.  
11 4th 1066, 1079-80 (1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303, 316 (2003).  
12 But *Concepcion* would seem to preempt California's arbitration exemption for claims requesting  
13 public injunctive relief. See *Arellano*, 2011 WL 184712.

14 The recent *Concepcion* decision compels preemption: "When state law prohibits  
15 outright the arbitration of a particular type of claim, the analysis is straightforward:  
16 The conflicting rule is displaced by the FAA. *Concepcion*, 131 S. Ct. at \*6. In sum,  
the Act preempts California's exemption of claims for public injunctive relief from  
arbitration, at least for actions in federal court.

17 *Id.* at \*2. Accordingly, the arbitration agreements for plaintiffs Friedman and Logan must be  
18 enforced.

### 19 C. Arbitration Agreements of Plaintiffs Weisblatt, Turk, and Osetek

20 Plaintiffs argue that Weisblatt's arbitration agreement is unconscionable under New York  
21 Law. Under New York law, "[a] determination of unconscionability generally requires a showing  
22 that the contract was both procedurally and substantively unconscionable when made . . ." *Gillman*  
23 v. *Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 791 (1988). Even before  
24 *Concepcion*, the Ninth Circuit has held that "class action waiver provision[s] . . . aren't substantively  
25 unconscionable under New York law." *Douglas v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 495  
26 F.3d 1062, 1068 (9th Cir. 2007). See also *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d  
27 566, 573 (S.D.N.Y. 2009) ("Courts applying New York law . . . have uniformly held that class action  
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1 waivers are not unconscionable."). Accordingly, plaintiff Weisblatt's unconscionability argument  
2 fails.

3 Similarly, plaintiff Turk's arbitration agreement is not unconscionable under Washington  
4 law. After *Concepcion*, plaintiff Turk's argument that provisions of his arbitration agreement  
5 "effectively establishes barriers to bringing small claims in arbitration, thereby exempting [ATTM]  
6 from liability" is untenable. Indeed, the leading case in Washington on the enforceability of  
7 provisions that require individual arbitration borrowed heavily from *Discover Bank*. See *Scott v.*  
8 *Cingular Wireless*, P.3d 1000, 1006-08 (Wash. 2007) (en banc). Because *Concepcion* overruled  
9 *Discover Bank*, it also overruled decisions based on *Discover Bank*.

10 Still further, plaintiff Osetek's arbitration agreement is not unconscionable under  
11 Massachusetts law. Plaintiffs recognize that Massachusetts law requires a showing that the contract  
12 provision at issue is both procedurally and substantively unconscionable. As explained with respect  
13 to the other plaintiffs, Osetek's substantive unconscionability arguments are preempted by the FAA.

14 **D. Hanna's Agreement With ATTM**

15 Unlike the other plaintiffs, plaintiff Hanna never accepted the iPad Agreement. Still, ATTM  
16 argues that Hanna is bound by the arbitration agreement he accepted when purchasing his iPhone  
17 3GS on June 11, 2009. Dkt. No. 26 ¶ 4, Ex. 1. Both the iPhone arbitration agreement and the iPad  
18 arbitration agreement contain the same terms. Dkt. No. 24 Ex. 1.

19 Plaintiffs contend that Hanna's purchase of a different service (a data plan for an iPhone  
20 rather than the iPad) at a different time (before the iPad was even introduced for sale) and in a  
21 different manner (through AT&T's website rather than through the iPad) does not indicate that  
22 plaintiff Hanna agreed to ATTM's Terms of Service in connection with his iPad.

23 The Supreme Court has held that:

24 [W]here the contract contains an arbitration clause, there is a presumption of  
25 arbitrability in the sense that an order to arbitrate the particular grievance should not  
26 be denied unless it may be said with positive assurance that the arbitration clause is  
27 not susceptible of an interpretation that covers the asserted dispute. Doubts should be  
28 resolved in favor of coverage. Such a presumption is particularly applicable where  
the clause . . . provides for arbitration of any differences arising with respect to the  
interpretation of this contract or the performance of any obligation hereunder. In  
such cases, in the absence of any express provision excluding a particular grievance

1 from arbitration, we think only the most forceful evidence of a purpose to exclude the  
2 claim from arbitration can prevail.

3 *AT&T Technologies, Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 650 (1986) (citations and  
4 quotations omitted). But the scope of an arbitration clause is not unlimited. Rather, the court "must  
5 ascertain and implement the reasonable expectations of the parties . . ." *Spear, Leeds & Kellogg v.*  
6 *Central Life Assur. Co.*, 85 F.3d 21, 28 (2d Cir. 1996). "Despite the presumption of arbitrability, the  
7 strong federal policy favoring arbitration may not extend the reach of arbitration beyond the  
8 intended scope of the clause providing for it." *Id.* (citation omitted).

9 The scope of Hanna's iPhone arbitration agreement is not as broad as ATTM contends.  
10 Nowhere does Hanna's iPhone arbitration agreement refer to devices other than the iPhone. While  
11 the iPhone arbitration agreement does explicitly require arbitration of all disputes and all claims  
12 between the parties, it does not specifically provide for the arbitration of any differences in  
13 interpretation arising with respect to the scope of the arbitration clause itself. ATTM contends that  
14 where an "arbitration clause . . . cover[s] 'all disputes that may arise' between the parties, then any  
15 dispute over any matter, whether or not it relates to a side agreement, would unquestionably be  
16 arbitrable." See *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1075, 1080 (9th Cir.  
17 2002). But *Inlandboatmens*, as well as the other precedent cited by ATTM, involve arbitration  
18 provisions contained in collective bargaining agreements ("CBAs"). Here, to extend Hanna's  
19 agreement to all disputes, whether or not related to the iPhone, would unreasonably extend  
20 arbitration to unintended areas. The iPad and iPhone, and their respective service plans, are distinct  
21 products and services. See Dkt. No. 100-1 Exh. A, 36 data plan FAQs ("Can I use my current  
22 iPhone service plan with the iPad? No. The cellular plan for iPhone is separate from the iPad  
23 plan."). Certainly a reasonable consumer would not contemplate that an arbitration agreement  
24 regarding the iPhone would bind him to arbitrate a dispute with respect to a future, unreleased  
25 device. At bottom, it can not reasonably be that both parties intended for the iPhone 3GS arbitration  
26 clause to extend to all future Apple products that utilize ATTM's data network.  
27  
28

1           Accordingly, ATTM's motion to compel arbitration with respect to plaintiff Hanna is denied.  
2 Hanna's claims regarding his iPad do not fall within the scope of his iPhone 3GS arbitration  
3 agreement.

4           **D. Plaintiffs' Request for Arbitration Discovery**

5           For the reasons already discussed, arbitration related discovery is unnecessary. The  
6 argument that plaintiffs seek to support through arbitration related discovery has already been  
7 addressed and rejected by the Supreme Court in *Concepcion*.

8           **III. ORDER**

9           The motion to compel arbitration is granted in part and denied in part. As required by the  
10 Federal Arbitration Act, 9 U.S.C. § 2, plaintiffs Adam Weisblatt, David Turk, Colette Osetek, Stuart  
11 Logan, and Aaron Friedman shall pursue their claims against defendant ATTM in accordance with  
12 their arbitration agreement. Their claims against ATTM are hereby stayed pending the outcome of  
13 arbitration. The motion to compel arbitration and stay claims with respect to Joe Hanna is denied.

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18 DATED: 7/19/2011

  
RONALD M. WHYTE  
United States District Judge